THE HON'BLE Ms. JUSTICE G. ROHINI

WRIT PETITION No.7593 OF 2007

DATE:26.07.2007

Between:

V.Goverdhan Reddy, S/o.V.Malla Reddy,
Aged about 35 years, Occ: Business,
R/o.17-1-388/P/80, Poornodaya colony,
Saidabad, Hyderabad and another.

....Petitioners.

AND

Karoor Vysya Bank Ltd., having its Regd.
Office at Karur (Tamilnadu) Branch Office in
Premises bearing No.6549, Rashtra Pathi Road,
Secunderabad Branch, Secunderabad,
Rep. by its Branch Manager and others.

...Respondents.

THE HON'BLE Ms. JUSTICE G. ROHINI

WRIT PETITION No.7593 OF 2007

ORDER:

This Writ Petition is filed seeking a declaration that the order, dated 28.03.2007, passed by respondent No.2 thereby recalling the warrant, dated 21.03.2007, issued in R.P.No.221 of 2002 in O.A.No.1343 of 1999 for taking physical possession of the property sold in public auction and handover the same to the petitioners, as arbitrary and illegal.

The facts in brief are as under:

Respondent No.1-bank filed O.A.No.1343 of 1999, on the file of the Debts Recovery Tribunal, Hyderabad, for recovery of amounts due from respondent No.7 to 11 herein. After due enquiry, the Tribunal issued Recovery Certificate, dated 26.07.2002. Pursuant thereto, respondent No.1 filed R.P.No.221 of 2003, in which proclamation of sale was issued on 12.12.2002 and the mortgaged property was proposed to be sold in the auction scheduled to be held on 12.06.2003. At that stage, respondent Nos.3 to 6 herein filed a Claim Petition being C.P.No.35 of 2003 before the Recovery Officer claiming title to the mortgaged property. The said Claim Petition was dismissed by the Recovery Officer by order dated 12.06.2003. Questioning the same, respondent Nos.3 to 6 herein filed R.A.No.7 of 2003 before the Debts Recovery Tribunal, which was also dismissed by the order, dated 13.12.2006.

It is to be noted that in the meanwhile, the auction was held on 12.06.2003, in which the two petitioners herein were declared as

the successful bidders. However, the sale in their favour could not be confirmed in view of the pendency of the proceedings before the Debts Recovery Tribunal in R.A.No.7 of 2003. After dismissal of R.A.No.7 of 2003, the petitioners herein have paid the entire sale amount of Rs.13,43,000/- by Demand Draft, which was accepted by respondent No.2-Recovery Officer and a sale certificate was also issued. Thereafter, the sale was registered with the Sub-Registrar.

While the petitioners were about to put in possession of the said property, the respondent Nos.3 to 6 herein filed O.S.No.2952 of 2006 in the Court of the

II-Additional Senior Civil Judge, Ranga Reddy district seeking a declaration that they are the absolute owners of the property in question having purchased the same under a registered sale deed dated 15.09.1999 from one Kishore Kumar Jain. It was pleaded that their vendor Kishore kumar Jain purchased the said property from respondent No.10 herein under an agreement of sale and subsequently obtained a decree for specific performance in O.S.No.248 of 1996, on the file of the Court of the II-Additional Senior Civil Judge, Ranga Reddy district, pursuant to which, a sale deed was executed in his favour through Court in E.P.No.29 of 1999. It was claimed that they came to know about the auction sale from the sale notice published by the Recovery Officer in the local dailies on 12.05.2003. They also sought a further declaration that the Recovery Certificate issued in O.A.No.1343 of 1999, dated 26.07.2002, on the file of the Debts Recovery Tribunal, Hyderabad is void and inexecutable and the auction conducted by the Recovery Officer on 12.06.2003 in favour of the petitioners herein is also void and illegal. Along with the suit they filed I.A.No.2766 of 2006, under Order XXXIX Rules 1 and 2 of Code of Civil Procedure, 1908 seeking stay of all further proceedings in O.A.No.1343 of 1999 including issuance of sale certificate by the Recovery Officer in favour of the petitioners herein. The learned II-Additional Senior Civil Judge, Ranga Reddy district,

after hearing both parties, dismissed I.A.No.2766 of 2006 by order, dated 12.03.2007, holding that the plaintiffs (respondent Nos.3 to 6 herein) are not entitled for the relief of temporary injunction since they failed to establish prima facie case and the balance of convenience was also not in their favour.

Pending I.A.No.2766 of 2006, since an order of *status quo* was in operation, the petitioners could not obtain the possession of the property in question. Soon after dismissal of I.A.No.2766 of 2006, the petitioners moved the respondent No.2-Recovery Officer for delivery of possession of the property. The respondent No.2 by order, dated 21.03.2007, appointed an Advocate-Commissioner to take over the physical possession of the schedule property and hand over the same to the petitioners herein, who are the auction-purchasers.

While so, respondent Nos.3 to 6 herein filed a memo, dated 27.03.2007, before respondent No.2-Recovery Officer to recall the warrant issued to the Advocate-Commissioner for delivery of possession stating that they are the bonafide purchasers of the property in question and that they have been in possession and enjoyment of the same for the past more than 12 years. It is also contended that since they are the third parties to the loan transaction and that O.S.No.2952 of 2006 for declaration of their title is pending before the competent Court, the only course open to the bank is to file a civil suit as provided under Rule 11(6) of the Income Tax Rules to recover the possession. Thus, it is contended that the warrant for delivery of possession of the property, in possession of a third party who is not the judgment-debtor, is in executable and therefore, the same is liable to be recalled.

Having entertained the said memo, dated 27.03.2007, the respondent No.2-Recovery Officer passed the impugned order, dated 28.03.2007, thereby recalling the warrant dated 21.03.2007, and directing the Advocate-Commissioner to return the warrant.

The said order passed by respondent No.2-Recovery

Officer is under challenge in this Writ Petition contenting *inter alia* that the impugned order which is in total contradiction with the earlier order passed by respondent No.2, dated 12.06.2003, dismissing the Claim Petition filed by respondent Nos.3 to 6, which order was also confirmed by the Tribunal by order, dated 13.12.2006, is arbitrary and illegal. It is also contended that respondent Nos.3 to 6, whose Claim Petition was earlier dismissed and whose application for temporary injunction was also dismissed by the civil Court, cannot be allowed to interdict the proceedings for delivery of possession of the property to the auction-purchasers and that the memo, dated 27.03.2007, to recall the warrant is nothing but abuse of the process of the Court.

Respondent Nos.3 to 6 filed a detailed counter affidavit stating that since O.S.No.2952 of 2006 filed for declaration of their title is pending before the civil Court, respondent No.2 has rightly recalled the warrant. It is also contended that the only course open to respondent No.1-bank is to file a civil suit for recovery of the possession of the property in possession of a third party who was not a party to any of the earlier proceedings.

I have heard the learned counsel for the petitioners as well as the learned counsel appearing for respondent No.1-bank and the learned counsel appearing for respondent Nos.3 to 6 in detail.

The learned counsel for respondent Nos.3 to 6 at the outset raised an objection as to the maintainability of the Writ Petition on the ground that against the impugned order an alternative remedy of appeal is available under Section 30 of the Recovery of Debts due to the Banks and Financial Institutions Act, 1993 (for short 'RDB Act, 1993'). The learned counsel also contended that since the respondent No.2 has not exceeded his jurisdiction in passing the impugned order, much less the order suffers from any illegality, the petitioners are not entitled to seek a Writ of Certiorari.

From the facts noted above, which are not in dispute, it is clear that the ownership to the property in question claimed by the

respondents 3 to 6 was rejected by the 2nd respondent – Recovery Officer and the appeal against the said order was also dismissed by the Debts Recovery Tribunal, Hyderabad by order dated13-12-2006. A perusal of the said order dated 13-12-2006 shows that the claim petitioners (respondents 3 to 6 herein) pleaded that they purchased the property in question on 15-9-1999 from one Kishore Kumar Jain who acquired title under a Sale Deed registered through the Court in execution of a decree for specific performance in O.S.No.248 of 1996 on the file of the Court of II-Additional Senior Civil Judge, Rangareddy District. The said appeal was dismissed by the Tribunal on merits after hearing both the parties recording a finding that the petitioners are not bona fide purchasers for value. The Tribunal also recorded a finding that the mortgage in favour of the 1st respondent Bank was created in the year 1983 itself, whereas the agreement of sale in favour of the vendor of the claim petitioners came into existence subsequently on 10-2-1984.

Though a further appeal lies against the said order before the Appellate Tribunal constituted under the RDB Act 1993, the respondents 3 to 6 herein did not prefer any appeal, but filed O.S.No.2952 of 2006 in the Court of the II-Additional Senior Civil Judge, Rangareddy District seeking a declaration that they are the absolute owners of the suit schedule property and that the recovery certificate issued by the Tribunal in O.A.No.1343 of 1999 as well as the order passed by the Recovery Officer in the claim petition as confirmed on appeal are arbitrary and illegal. Though the said suit is pending, the application for grant of temporary injunction restraining the Recovery Officer from issuing the sale certificate in favour of the petitioners herein and also seeking stay of all further proceedings in O.A.No.1343 of 1999 pending on the file of the Tribunal was dismissed by the Civil Court by an elaborate order dated 12-3-2007 which has become final.

In the circumstances, the question is whether the Recovery

Officer is justified in recalling the warrant dated 21-3-2007.

It is to be noted that pursuant to the Recovery Certificate dated 26-7-2002 in O.A.No.1343 of 1999, the mortgaged properties were put to open auction in which the petitioners herein were declared as the successful bidders on 12-6-2003. Thereafter the entire sale consideration was paid by them and a sale certificate was issued following due process of law and an advocate-commissioner was appointed for delivery of possession to the petitioners.

Section 25 of the RDB Act, 1993 provides for modes of recovery of dues on the basis of the Recovery Certificate issued by the Tribunal. One of the modes is attachment and sale of the movable or immovable property of the defendant. By virtue of Section 29 of the RDB Act, 1993 the provisions of the Second and Third schedules to the Income-tax Act, 1961 and the Income-tax Certificate Proceedings Rules, 1962 are made applicable for recovery of the amounts due under the RDB Act 1993. Therefore the sale of the mortgaged properties conducted on 12-6-2003 is governed by the procedure prescribed under Schedule-II to the Income-tax Act, 1961.

Rule 9 and Rule 11 of the Rules under Schedule-II, to the extent they are relevant for the purpose of the instant case, may be extracted hereunder :

> *"**General bar to jurisdiction of civil courts, save where fraud alleged**.*
> *9. Except as otherwise expressly provided in this Act, every question arising between the Tax Recovery Officer and the defaulter or their representatives, relating to the execution, discharge or satisfaction of a certificate, or relating to the confirmation or setting aside by an order under this Act of a sale held in execution of such certificate, shall be determined, not by suit, but by order of the Tax Recovery Officer before whom such question arises :*
> ***Provided** that a suit may be brought in a civil court in respect of any such question upon the ground of fraud*
>
> ***Investigation by Tax Recovery Officer.***

11. (1) Where any claim is preferred to, or any objection is made to the attachment or sale of, any property in execution of a certificate, on the ground that such property is not liable to such attachment or sale, the Tax Recovery Officer shall proceed to investigate the claim or objection :

Provided *that no such investigation shall be made where the Tax Recovery Officer considers that the claim or objection was designedly or unnecessarily delayed.*

(2) Where the property to which the claim or objection applies has been advertised for sale, the Tax Recovery Officer ordering the sale may postpone it pending the investigation of the claim or objections, upon such terms as to security or otherwise as the Tax Recovery Officer shall deem fit.

(3) … …. …. … … … .. …

(4) … … …. … … … …. …

(5) Where the Tax Recovery Officer is satisfied that the property was, at the said date, in the possession of the defaulter as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Tax Recovery Officer shall disallow the claim.

(6) Where a claim or an objection is preferred, the party against whom an order is made may institute a suit in a civil court to establish the right which he claims to the property in dispute; but, subject to the result of such suit (if any), the order of the Tax Recovery Officer shall be conclusive."

As could be seen, the Recovery Officer alone is competent to determine any question relating to the execution, discharge or satisfaction of the Recovery Certificate. Accordingly, the objection raised by the respondents 3 to 6 before the Recovery Officer was already considered and disallowed by order dated 12-6-2003 in terms of Rule 11(5) of the Rules. Under Rule 11 (6) of the Rules, against the order of the Recovery Officer disallowing such claim, it is open to the party against whom such order was made to institute suit in a civil Court to establish the right which he claims to the property in dispute.

However, sub-rule (6) made it clear that the order of the Recovery Officer shall be conclusive subject to the result of the said suit.

In the circumstances, the mere fact that O.S.No.2952 of 2006 filed by the respondents 3 to 6 herein is pending is not a valid ground to stall the sale proceedings. Until their claim is established in the said suit, the order of the Recovery Officer dated 12-6-2003 is conclusive in terms of Rule 11 (6) of the Rules.

It is also relevant to note that in the case on hand the sale was held on 12-6-2003, the same was confirmed, sale certificate was issued and the same was also registered in accordance with the procedure prescribed under Rule 52 to Rule 56 of the Rules under Schedule-II. The petitioners herein who were declared to be the purchasers had paid the full amounts of purchase money to the Recovery Officer within the time prescribed. Thus, the sale has become absolute. In such a situation, the only course open to any person aggrieved is to make an application under Rule 60 to set aside the sale within 30 days from the date of sale on depositing the amount specified in the proclamation of sale with interest at 15% p.a. apart from the amounts for payment to the purchaser, as penalty which would be a sum equal to 5% of the purchase money. It is also open to make an application to set aside the sale under Rule 61 on the ground of non-service of notice or on the ground of the material irregularity in publishing or conducting sale. Where no such application is made within 30 days from the date of sale, the Recovery Officer shall make an order confirming the sale and thereupon the sale shall become absolute under Rule 63 of the Rules. Admittedly, the respondents 3 to 6 herein did not make any such application for setting aside the sale within 30 days from the date of sale. In the circumstances, the Recovery Officer is not competent to stop the sale proceedings on any ground whatsoever.

For the aforesaid reasons, the impugned order passed by the 2nd respondent in recalling the warrant dated 21-3-2007 being

without power or authority, is hereby set aside and the Writ Petition is allowed. No costs.

_____

G. ROHINI, J.

Dt.26-7-2007

Gs/gbs